have been proved. The authority relied on was obviously *Toh Ah Loh and Mak Thim* v. *R.*[1] Consequently, I am of the opinion that the question put to the appellant was not caught by section 132(1) of the Evidence Ordinance.

The other ground of appeal was that if the evidence of the appellant was properly admissible against him, there was even on it no evidence of possession. With respect, I do not agree. The appellant in his evidence admitted his knowledge that it was samsu, he showed that he had in him the power of disposal of the thing possessed, and he was conscious of his possession, satisfying all the three ingredients of possession in the test laid down in *Toh Ah Loh & Mak Thim's* [1] case.

The question, however, is whether the evidence of the appellant, which is admissible in evidence, was properly admitted. No objection was taken on this point, either at the trial in the court below or on appeal, but clearly inadmissible evidence does not become admissible by reason of the failure of counsel to object at the relevant time, and an appellate court must disregard all such evidence: *Wong Kok Keong* v. *R.*[2] The record of appeal discloses that the evidence of the appellant was given in Hokkien, a language which I must take to be unknown to the president of the sessions court who heard the case and who is of the Malay race. The appellant's evidence was interpreted into English and recorded in English and in its English form was produced at the trial without the interpreter being called to give evidence of the questions put to the appellant and the answers given by him to the court. On the authority of *R.* v. *Attard*,[3] I must hold, therefore, that as far as the evidence adduced at the trial went, the statement produced by the prosecution was hearsay and inadmissible. Without this evidence, there is no evidence against the appellant.

The conviction of the appellant is, therefore, quashed and the fine, if paid, is to be refunded to him.

Appeal allowed.

CHONG FOOK KAM & ANOR. v. SHAABAN & ORS.

[F.C. (Barakbah L.P., Suffian & MacIntyre F.JJ.) May 13, 1968]

[K.L. — Federal Court Civil Appeal No. X.31 of 1967]

Tort — False imprisonment — Arrest without warrant — Extent of power of police officer to arrest without warrant — Criminal Procedure Code (Cap. 6), s. 23(i)(a) — Police Ordinance, 1952, s. 41(1).

Constitutional Law — Fundamental liberty — Arrest of suspect — Where investigation cannot be completed within 24 hours — Magistrate's order for detention — Malaysia Constitution art. 5(3) & (4) — Criminal Procedure Code (Cap. 6), s. 28 — Courts Ordinance, 1948, s. 107(1) — Police Ordinance, 1952, s. 41(1).

This was an appeal from the decision of the High Court reported in [1967] 2 M.L.J. 54. The respondents, police officers, had arrested the appellants, the driver and attendant of a lorry without a warrant. The arrest was as a result of investigations carried out by the respondents on receiving a complaint of a hit-and-run road accident. The lorry which the first appellant was driving answered the description of the lorry involved in the accident. The appellants were brought before a magistrate the following day and a detention order was obtained. As there was insufficient evidence to connect them with the accident, the appellants were later released. They brought an action for damages for false imprisonment. The action was dismissed. The learned judge held that the arrest was lawful as there was sufficient information available to the respondents at the time of the arrest to give rise to a reasonable suspicion that the appellants had committed a seizable offence under section 304A of the Penal Code or section 34A of the Road Traffic Ordinance.

Held: even assuming that the appellants were the persons responsible for the accident, there was no evidence to prove that they were guilty of rash or dangerous driving. No *prima facie* offence under section 304A of the Penal Code or under section 34A of the Road Traffic Ordinance had been disclosed at the time of the arrest. The respondents were therefore not justified in arresting the appellants without a warrant.

FEDERAL COURT.

S. P. Seenivasagam (*D. P. Xavier* with him) for the appellants.

Ajaib Singh (Deputy Public Prosecutor) for the respondents.

Suffian F.J.: We allowed this appeal. Now I give my reasons.

On the night of the 10th of July, 1965, Kanniah was driving car No. BC 6912 towards Semantan estate in Mentakab. He had four passengers on board. At Batu 2, Jalan Karak, he passed an oncoming lorry with a trailer laden with timber. As he passed the lorry, a log fell off it on to his car. One of the passengers in the car was killed.

When he arrived in Mentakab the same night, he lodged a report (exhibit D.1) which translated reads:—

"At 9.15 p.m. on 10th July, 1965, I was driving motor car No. BC 6912. I was returning to Semantan estate. In the car I had four friends returning to Semantan estate. When I arrived at Batu 2, Jalan Karak, in front of me was a lorry with a trailer loaded with timber sawn and unsawn. When we passed each other in the opposite direction, some timber fell off the lorry and hit my windscreen. It hit my friend and my uncle. I immediately stopped my car and saw that my uncle was unable to speak. I took them to hospital at Mentakab. When I arrived there, I found that my uncle had died and the others were injured. I cannot recognize the lorry nor its number because it was night time and the lorry did not stop, it went straight on towards Mentakab town. The time of the incident was about 9.25 p.m. on 10th July, 1965. This is my report. The name of the dead person was Govindan and of the injured person Persamay."

Inspector Shaaban bin Hussien (the first defendant) was the area inspector in Mentakab. I will call him the inspector. At about 10.15 p.m. he was informed of the report and went to

the Inquiry Office at the Police Station. He interrogated Kanniah who gave him a description of the lorry saying that it had a red bonnet. The inspector then informed A.S.P. Hassan bin Daud the O.C.P.D. (the second defendant). I will call him the O.C.P.D. He instructed the inspector to put up road blocks at various places in order to stop for the purpose of interrogation any lorry with a trailer answering the description given by Kanniah. The inspector accordingly carried out the instructions. Together with Kanniah he went to the scene of the accident which was at a double bend and found broken glass on the grass verge as well as broken sawn timber. They went to see the dead person at the mortuary. The same night the inspector obtained information that between 9 p.m. and 10 p.m. that night a timber lorry with a red bonnet and loaded with sawn timber had been seen travelling from the direction of Bentong towards Mentakab. At about mid-night the inspector saw a timber lorry C 8200 with a red bonnet parked in front of the Caltex Petrol Station on the Mentakab-Temerloh road. He sent for Kanniah, who identified the lorry as being similar to the one involved in the accident. The inspector tried to locate the driver of the lorry, but was unsuccessful. He obtained particulars of the owner of the lorry from the name plate affixed to the back of the driver's cabin and telephoned the sawmill in question but received no reply. He detailed two police constables to guard the lorry and to bring it to the police station if its driver turned up. He went round Mentakab and Temerloh towns and discovered that no vehicle of the description given by Kanniah had passed through any of the road blocks. He further checked the only three sawmills in Mentakab and discovered there was no vehicle answering to that description. He suspected that lorry C 8200 was the vehicle involved in the accident. Before returning to his quarters that night the inspector gave instructions to release the two constables guarding the lorry.

At about 5 a.m. the following day (11th July, 1965) the inspector went to the Caltex Petrol Station and found that the lorry had gone. He informed the O.C.P.D. who instructed him to contact the police stations at Lanchang and Bukit Tinggi and, if possible, at Gombak to stop the lorry for purposes of investigation. The inspector rang up the police stations and told them to stop lorry C 8200 as it had been involved in a fatal road accident and to inform him accordingly.

It is to be noted that the evidence is that both the inspector and the O.C.P.D. thought at this stage that there was an offence (which is seizable) disclosed under section 304A, Penal Code, and that the O.C.P.D.'s instruction was to stop the lorry for the purpose of investigation. It is to be further noted that the day was a Sunday.

At 7.20 a.m. the O.C.S., Bukit Tinggi, corporal Satam bin Sibon (D.W.6) received instructions from the inspector. He then instructed P.C. 22927 and another to go to the 20th milestone which was about a quarter of a mile from the police station and put up a road block to stop the lorry. A police constable arrived at the 20th milestone at 7.55 a.m. He saw the lorry loaded with sawn timber stationary in front of a coffee shop. He told the driver, the second plaintiff, that he had received instructions from his O.C.S. that the driver was suspected of being involved in a motor accident. At 8.05 a.m. the O.C.S. arrived at the scene. He was then asked by the driver what wrong he had done and the O.C.S. told him that he had received instructions from Mentakab to detain him on suspicion of being involved in a fatal road accident. The attendant, the first plaintiff, was then within hearing distance of them.

Both the driver and the attendant were detained. Eventually they were handed over to the inspector and the O.C.P.D. The inspector and the O.C.P.D. brought the plaintiffs back to Mentakab for further interrogation. At Mentakab both the plaintiffs told the defendants their movements at the relevant time. The driver told the inspector that he had eaten at a shop and afterwards had his hair cut. He led the inspector to the shops, but the inspector got no help from the persons he interviewed there. He informed his O.C.P.D. of the latest situation and was instructed to carry on with the investigation and if necessary to obtain a detention order from a magistrate under section 117 of the Criminal Procedure Code on the following day, a Monday (12th July, 1965). The inspector accordingly obtained the order from the magistrate, Temerloh, that day between 8.30 and 9.00 a.m. The investigation ended that night.

On the following day (13th July, 1965) at about 3 p.m. the inspector reported to the O.C.P.D. that he had completed his investigations but had not obtained sufficient evidence to connect the lorry or the two plaintiffs with the accident. The O.C.P.D. instructed the inspector to release the plaintiffs. The inspector saw the magistrate who ordered the plaintiffs' release. The plaintiffs were released.

On these facts the plaintiffs lost their claim for damages for false imprisonment against the first two defendants and their employers, the Government of Malaysia (third defendant). The learned judge found that the information in the hands of the police prior to the arrest disclosed a *prima facie* offence under section 304A of the Penal Code, a seizable offence, and therefore the arrest was lawful.

The plaintiffs appealed. In this appeal their counsel agreed that the detention may be divided into two parts: (a) detention prior to the deten-

tion order issued by the magistrate under section 117 of the Criminal Procedure Code and (b) detention after that order. Counsel did not claim damages in respect of the second part.

I now state the relevant law.

At common law a police constable in England may arrest without warrant any person in those cases where a private person may lawfully arrest by common law without warrant. He may also within his district arrest without warrant on reasonable suspicion of felony, whether a felony has or has not been committed. See *Halsbury's* Laws of England, 3rd edition, volume 38, paragraph 1269.

Section 3(1) of the Civil Law Ordinance No. 5 of 1956 provides:—

"Save in so far as other provision has been made or may hereafter be made by any written law in force in the Federation or any part thereof, the court shall apply the common law of England and the rules of equity as administered in England at the date of the coming into force of this Ordinance:

Provided always that the said common law and rules of equity shall be applied so far only as the circumstances of the States comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary."

It is to be noted that the English common law which governs false imprisonment would apply in West Malaysia only in the absence of other provision made by any local written law.

The common law does not apply in this instance because of the existence of local written law. Therefore it is unnecessary and indeed confusing to refer to English authorities.

The written law on the subject is as below.

Clause 1(1) of article 5 of the Constitution provides:—

"No person shall be deprived of his . . . . personal liberty save in accordance with law."

The general rule is that no person may ordinarily be arrested without a warrant signed by a magistrate. A person may be arrested without a warrant only if so expressly authorized by law. The legal provision relied on by the defendants in justifying the arrest of the two plaintiffs is section 23(i)(a) of the Criminal Procedure Code which reads:—

"Any police officer . . . . may without an order from a magistrate and without a warrant arrest . . . . any person who has been concerned in any offence committed anywhere in Malaysia which is a seizable offence under any law in force in that part of Malaysia in which it was committed or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned."

What happens when a person has been arrested? Clause (3) of article 5 of the Constitution provides:—

"Where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice."

Clause (4) of the same article provides:—

"Where a person is arrested and not released, he shall without unreasonable delay, and in any case within 24 hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority."

Section 28 of the Criminal Procedure Code (an earlier enactment) makes the same provision. It reads:—

"(i) A police officer making an arrest without a warrant shall without unnecessary delay and subject to the provisions herein as to bail or previous release take or send the person arrested before a magistrate's court.

(ii) No police officer shall detain in custody a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable.

(iii) Such period shall not in the absence or after the expiry of a special order of a magistrate under section 117 exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the magistrate's court."

What happens if a police officer finds that he cannot complete his investigation within the period of 24 hours fixed by section 28 and wishes to further detain the arrested person? He could act under section 117 which reads:—

"(i) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall forthwith transmit to a magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before such magistrate.

(ii) The magistrate before whom an accused person is produced under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such magistrate thinks fit for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case and considers further detention unnecessary he may order the accused person to be produced before a magistrate having such jurisdiction.

(iii) A magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing."

An order of a magistrate authorising the detention of the arrested person beyond the period of 24 hours made under section 117 is a judicial act and cannot found a claim for damages against the magistrate because of section 107(1) of the Courts Ordinance, 1948, which reads:—

"No . . . . magistrate or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of."

Nor may such an order found a claim for damages against a police officer because section

41(1) of the Police Ordinance No. 14 of 1952 (now section 32(1) of the new Police Act No. 41 of 1967) provided:—

"Where the defence to any suit instituted against a police officer is that the act complained of was in obedience to a warrant purporting to be issued by any competent authority, the court shall, upon production of the warrant containing the signature of such authority and upon proof that the act complained of was done in obedience to such warrant, enter judgment in favour of such police officer."

In view of these provisions, counsel for the plaintiffs was right in not claiming damages in respect of the detention following the magistrate's detention order.

What powers of investigation would the police have in this case if they had not arrested the plaintiffs? The answer is to be found in sections 111 and 112 of the Criminal Procedure Code.

Sub-sections (i) and (ii) of section 111 of the Criminal Procedure Code read as follows:—

"(i) A police officer making an investigation under this Chapter may by order in writing require the attendance before himself of any person being within the limits of the police district in which he is making an investigation who from the information given or otherwise appears to be acquainted with the circumstances of the case, and such person shall attend as so required; provided that no person shall be required under this section to perform a journey of more than seven miles from his usual place of abode exclusive of such portion of the journey as may be performed by train or motor car or other vehicle.

(ii) If any such person refuses to attend as so required such police officer may report such refusal to a magistrate who may thereupon in his discretion issue a warrant to secure the attendance of such person as required by such order aforesaid."

Section 112 of the Criminal Procedure Code reads as follows:—

"(i) A police officer making a police investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.

(ii) Such person shall be bound to answer all questions relating to such case put to him by such officer:

Provided that such person may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture.

(iii) A person making a statement under this section shall be legally bound to state the truth, whether or not such statement is made wholly or partly in answer to questions.

(iv) A police officer examining a person under subsection (i) shall first inform that person of the provisions of sub-sections (ii) and (iii)."

The defendant admit arresting the plaintiffs, so they have to prove that the arrest was lawful. As already said, they rely on section 23(i)(a) of the Criminal Procedure Code. That provision can be re-written as follows:—

Any police officer may without an order from a magistrate and without warrant arrest —

(a) any person who has been concerned in any seizable offence;

(b) any person against whom a reasonable complaint has been made that he was concerned in a seizable offence;

(c) any person against whom credible information has been received of his having been concerned in a seizable offence;

(d) any person against whom a reasonable suspicion exists of his having been concerned in a seizable offence.

The defendants say that the facts available to the police officers at the time of the arrest *prima facie* disclose an offence against section 304A of the Penal Code and (their counsel added during the appeal) an offence against section 34A of the Road Traffic Ordinance, both of which are seizable and therefore the first and second defendants may lawfully arrest the plaintiffs without warrant.

It would appear that where a person arrested without a warrant is eventually found guilty of a seizable offence, it does not matter — because of (a) above — Whether or not the officer who arrested him had received a reasonable complaint on credible information of the accused being concerned in the offence, or whether or not the officer had a reasonable suspicion of the accused having been so concerned. But here the plaintiffs were eventually released without any charge being preferred against them. So the defendants can only rely on (b), (c) and (d) above — which means that they have to prove that they had received a reasonable complaint or credible information or they had a reasonable suspicion that the plaintiffs were concerned in a seizable offence.

But even if the complaint or suspicion was reasonable and the information was credible, it is important to observe that the complaint, information or suspicion must relate not to any offence; it must relate to a seizable offence. I considered the information available to the police before and even after the arrest. Even assuming that the lorry, the driver and the attendant were involved in the accident, in my judgment the information available to the inspector and the O.C.P.D. was insufficient to prove *prima facie* a case against the plaintiffs under section 304A of the Penal Code or under section 34A of the Road Traffic Ordinance. It is true that Govindan's death was tragic and whoever was criminally responsible for it should be caught and punished, but the death alone does not *prima facie* prove rashness or negligence or reckless or dangerous driving on the part of the driver and still less of the attendant. The timber which fell off might have been properly secured

in the first place, but fell off because, unbeknown to the driver and his attendant, it had been interfered with by some mischievous person or it fell off by act of God. In these circumstances, how can it be said that a *prima facie* offence under section 304A of the Penal Code or under section 34A of the Road Traffic Ordinance had been disclosed? In my judgment, in these circumstances the inspector and the O.C.P.D. were not justified in arresting the driver and the attendant without a warrant.

Mr. Ajaib Singh, for the defendants at this appeal, urged the court to look at the evidence as a whole and to take into account the fact that there are many timber lorries on the road in Pahang and the inconvenience that would be caused to the police if they were not allowed to arrest without a warrant in these circumstances. He cited with approval a passage in the learned judge's judgment where he said that it is in the public interest that the culprit responsible for Govindan's death should be caught and punished. That may be so, but it is equally in the public interest that no innocent person should be arrested without a warrant merely to serve the convenience of investigation officers, however much one wishes to support the police in their task of securing the safety of road users.

With the information available to the police officers at the time of the plaintiffs' arrest, at most the plaintiffs' could only be treated as potential witnesses. The law does not, however, empower the police to arrest and detain potential witnesses. The police should have proceeded against them under sections 111 and 112 of the Criminal Procedure Code. Section 111 empowers the police to require their attendance at the police station so that they may be questioned. If they attend, they may under section 112 be questioned. If they do not attend, then under sub-section (ii) of section 111 they may be compelled by a magistrate to attend. It is of course desired that the public should co-operate with the police in the enforcement of law. So it is important for the police to know and observe the limits of their power to arrest without warrant.

After the announcement by the court of its decision to allow the appeal, counsel retired briefly to consider quantum of damages. They returned to announce that they had agreed that each of the plaintiffs should be paid $2,500 by the defendants as well as receive costs here and in the court below. Judgment was entered accordingly.

Appeal allowed.

Solicitors: *Xavier & Thambiah.*

SING HOE MOTOR CO. LTD. v. PUBLIC PROSECUTOR

[O.Cr.J. (Raja Azlan Shah J.) May 22, 1968]

[K.L. — Criminal Application No. 1 of 1968]

Road Traffic — Motor car used as public service vehicle — Unlicensed — Vehicle subject to hire-purchase agreement — Hirer convicted — Discretion to order forfeiture — Road Traffic Ordinance, 1958, s. 92(1) & (4).

Interpretation — "Shall" and "may".

This was an application for an order that a motor-car which was seized under section 92(4) of the Road Traffic Ordinance, 1958, be released to the applicants as the true owners of the vehicle. One Yap had hired the vehicle from the applicants under a hire-purchase agreement. While the vehicle was still on hire-purchase, Yap was convicted under section 92(1) of the Road Traffic Ordinance for having used it as a public service vehicle. An order for the forfeiture of the vehicle was made under section 92(4) of the Ordinance. At the hearing of the application, the question before the court was whether, following a conviction for an offence under section 92(1), section 92(4) made it mandatory for the court to order a forfeiture of the vehicle.

Held: (1) it was not mandatory for the court to order a forfeiture of the vehicle where there has been a conviction under section 92(1) of the Road Traffic Ordinance. The word 'may' in section 92(4) of the Ordinance vested a discretion in the court whether or not to order a forfeiture. In order to exercise such discretion properly the known circumstances with regard to the particular vehicle should be fully considered;

(2) the order for forfeiture of the vehicle was wrongly made. The court ordered a proper enquiry as to the true ownership of the motor-vehicle.

Cases referred to:—

(1) *Public Prosecutor* v. *Ong Keng Seong* [1967] 1 M.L.J. 40.

(2) *Public Prosecutor* v. *Teoh Gaik Beng* [1967] 2 M.L.J. 110.

(3) *Gan Chye Huat* v. *Public Prosecutor* [1962] M.L.J. 27.

(4) *R.* v. *Ng Hee Weng & Ors.* [1956] M.L.J. 85.

(5) *Public Prosecutor* v. *Yap Yoke Sam* [1955] M.L.J. 114.

(6) *Gan Kim Luu* v. *Public Prosecutor* [1961] M.L.J. 35 at p. 36.

CRIMINAL APPLICATION.

C. Thambiah for the applicants.

K. Somasundram (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah J.: This is an application for an order that motor-car bearing registration No. C 6721, the subject matter of Kuala Selangor Magistrate's Court Summons Case No. 378 of 1967 and forfeited by the learned magistrate under section 92(4) of the Road Traffic Ordinance 1958, be released to the applicants as the true owners of the said vehicle.

One Yap Kim Eng had bought the said motor-car on hire-purchase from the applicants. Whilst the said car was still on hire-purchase he was charged for having used it as a public service